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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

The official report of the opinion of the United States Emergency Court of Appeals, the court below, is not yet available. It is found in the Record filed herein at pages 167-176 incl.

Jurisdiction

Jurisdiction of this Court is invoked under Section 924 (d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 924 (d)) providing that within 30 days after the entry of a judgment by the Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States.

Statement of the Case, Containing All Facts Which Should Be Known in Order to Determine the Controversy

1

Under the Emergency Price Control Act of 1942 as amended (50 U. S. C. A., App. 901, et seq.), on the 23rd of

November 1945 the Stabilization Administrator issued Directive 87 (10 F. R. 14450) (R. 4), under the caption "Imports of Green Coffee". It declared a critical need for encouraging imports of green coffee and found necessity for subsidizing imports of green coffee; authorized and directed respondent to establish and carry out a program with respect to imports of green coffee. Thereafter as of November 19, 1945 complainant and respondent accordingly entered into their original contract (R. 41), which was first amended March 19, 1946 (R. 49) and finally amended May 7, 1946 (R. 50).

2

At all times complainant was lawfully qualified under the requirements of the contract as the Importer being engaged in the importation of coffee (R. 41). At all times complainant was traditionally and remains, a coffee Roaster economically identical equally and alike, with all other Roasters as such. Likewise at all times complainant was traditionally and remains, a coffee Importer as such identical, equally and alike, with all coffee Importers (R. 129 & 136).

3

At all times there existed in the coffee industry of the United States those exercising the traditional status and functions exclusively of the Importer as such; those exercising the traditional status and functions exclusively of the Roaster as such, and, those exercising the traditional status and functions of both the Importer and the Roaster. At all times the traditional established industry practices of all Importers as such, and of all Roasters as such, without regard to whether the exercise of such status, functions or practices were integrated or singular and exclusive, were well known to the coffee industry and were, in each respec-

tive status and function as such, economically competitive, equal, alike and identical. At all times it was lawful to continue the exercise of each, either or all of the aforementioned traditional established industry statuses, functions and practices, and complainant did so at all times (R. 119 & 135).

4

The term "the Importer" and the term "the Roaster" are not and have never been synonymous in the coffee industry. In the coffee industry the practice of the Roaster in acquiring green coffee from domestic sources of supply including other Roasters and Importers is not and has never been known, understood or referred to as being the same as "importation of green coffee" or importing. In the coffee industry the term "the Importer" does not and has never meant, identified, signified nor implied the acquisition of green coffee from any domestic source of supply but has always meant, identified and signified the singular activity of actual importation and the specific coffee actually imported consequent of such activity. In the coffee industry all contracts and transactions relating to green coffee are and have always been commonly known, used and interpreted in all things in full accord with the above and foregoing distinctions (R. 14).

5

During the green coffee import subsidy period there were a maximum of 312 import subsidy contracts while there were more than 1,000 established Roasters as such (R. 5, 128, 136). The normal established traditional flow of coffee distribution in the United States is from the foreign countries to the Importer; from the Importer to the Roaster; from the Roaster after processing as such, into Consumer trade outlets (R. 130 & 136). Under this contract and amendments the

Roaster as such, could not claim or lawfully receive this subsidy (R. 42).

6

At the terminal point of the coffee import subsidy contract complainant repaid to respondent $110,135.28 being equivalent to its earned 3¢ per pound import subsidy, on account of green coffee remaining in its inventory which it had imported as the Importer engaged in the importation thereof, and of which no complaint is made. At the same time respondent withheld from valid pending claims of complainant the further sum of $79,059.36 on account of coffee then in its inventory as follows (at 3¢ per pound): $11,811.36 on account of coffee acquired by complainant in the traditional exercise of its Roaster status and functions as distinguished from its Importer status and functions, prior to the inception of the program or contract; plus $67,248.00 on account of coffee then in its inventory which complainant had lawfully acquired from the inception date of the contract to the terminal date thereof, in the exercise of its traditional Roaster industry status and functions as such, and of which complainant had not engaged in importation. Included in the said $67,248.00, the sum of $44,466.84 is represented by such Roaster status coffee so acquired prior to the first amendment, and $55,678.20 is represented by such coffee so acquired in complainant's exercise of its Roaster status and functions as such, prior to the final amendments (R. 124 & 136). In order to accomplish lawful importation under the contract and as amended it was reasonable and necessary for complainant to first expend a sum equal to the 3¢ per pound subsidy (R. 132 & 137).

7

Respondent asserts that by virtue of the provisions of Paragraph 14 of the amended contract (R. 134), it is law-

fully entitled, mutually intended and agreed, to withhold prospectively and retrospectively the said total sum of $79,059.36 as is herein sued for by complainant.

8

At all times pertinent all government controls and regulations including WFO-146 (11 F. R. 3785), applicable to the Roaster industry were in all respects applicable equally and alike, to all the 1,000 established Roasters as such, and all Importer controls were applicable to all the Importers as such, without regard to whether any Roaster did or did not have or exercise any Importer status and functions and vice versa (R. 128, 129 & 130), until respondent came to interpret its green coffee import subsidy contract as amended.

9

Complainant did not knowingly understand, consent or agree that the intent, purpose or effect of its performance of its R. F. C. import contract equally and upon the same basis as all other Importers as such, was intended to prejudice complainant's equally lawful and traditional Roaster practice as such, unequally and to complainant's disadvantage in comparison with all other Roasters as such engaging in the identical industry practices and economically competitive with complainant (R. 13).

10

All the Roaster industry practices (economic and mechanical functions), of the complainant at all times herein and for some 30 years prior were in all things identical to the traditional practices of all other Roasters. The only difference between the practices of all other Roasters and the practices of the complainant in this case is the mere matter of degree or extent. Complainant indulges in such practices by which its Roaster class of inventory is obtained only to a lesser extent than do those Roasters who procure

all of their coffee as a result of such practices. The recapture prejudice complained of in this case is confined to complainant's Roaster class of inventory identical in all things as to all Roasters as such. It is not disputed that as to the Roaster status concerned in this case complainant is and has always been a Roaster exactly as, identical and economically competitive with all Roasters (R. 120, 121, 128, 132 & 136).

11

The lawful continuation without recapture prejudice of the established industry practice of all Roasters in acquiring all or a part of their green coffee from Importers in the same manner as they had traditionally done prior to this coffee import program would not tend to defeat the purpose of the program, but would tend to restore and stabilize the normal economy and flow of distribution and the normal building up of green coffee inventories in the United States. Such practice was not forbidden but was lawfully permitted to all Roasters alike under the terms of W. F. O. 146 and in all other respects, regardless of whether any Roaster did or did not import or did or did not have an R. F. C. import subsidy contract (R. 8 & 128).

12

In the coffee industry the term, "types of coffee" has traditionally meant and still refers to the characteristics of the particular coffee beans, such as, hard, soft, mild, earthy, acidity, etc. It customarily relates to the place of origin or growth, for such coffees naturally have certain inherently known characteristics as distinguished from coffees grown in other localities (R. 15, 123 & 136).

13

The inevitable effect of respondent's interpretation and withholding as herein complained of, places a burden

(prospective and retrospective) of 3¢ per pound ($79,059.36) upon complainant's lawful Roaster industry status, practices and functions as such, which are and were traditionally competitive, economically identical, equal and alike with all other Roasters as such and which burden is not equal and alike with, at least 688 other Roasters as such who had at all times pertinent a substantial quantity of identical Roaster class of inventory, acquired, used and sold in all things at and under identical times, circumstances, controls and economically competitive with complainant (R. 121 & 130). This unequality had never before existed in the coffee industry and is contrary to the traditional practices of the industry.

14

Complainant asserts, that it did not prospectively or retrospectively, mutually agree or intend, and it was not the intent of the program or contract, and it was contrary to the established industry practices, and the law, and unnecessary to the accomplishment of the purposes of the contract to prejudice its lawful continued exercise of its traditional Roaster industry status, functions and practices as such equally and alike with all Roasters; that such withholding by respondent gives the contract an unlawful, discriminatory, invalid and unintended purpose and effect.

15

There is no charge or question of any violation by complainant.

Summary of the Argument

(A) Respondent's interpretation of the contract and its withholding of $79,059.36 earned by petitioner's performance thereunder is prospectively and retrospectively contrary to the intent and provisions of this Import program

and of law, particularly the Emergency Price Control Act of 1942 as amended, and Section 902 (h) thereof (50 U. S. C. A. App. 902 (h)).

(B) Respondent's interpretation of this import contract and withholding $79,059.36 of earnings thereunder, is prospectively and retrospectively contrary to the terms, provisions, intent and purposes of the contract and to the mutual intent, understanding and consent of the parties.

(C) Respondent's interpretation of this green coffee import contract is unlawful and causes the same to be invalid because it is unnecessarily arbitrary, capricious, unreasonable and unfairly and substantially discriminatory prospectively and retrospectively, against the traditional competitive Roaster industry status, functions and practices as such.

Argument under Summary (A)

1

The basic purposes and intent of this coffee import subsidy program, and of law, are found in the tenor of the language employed and in the common sense effect thereof in the light of the inherent nature and attributes of the undertaking and the established industry practices deliberately employed to accomplish the purposes.

2

PURPOSES OF THE PROGRAM

The tenor of the language employed in Directive 87 (10 F. R. 14450) amply describes the dominant purposes:

> "The OPA, the State Department and the Department of Agriculture have submitted information to me with respect to the critical need for encouraging imports of green coffee." "* * * it is necessary to provide

a program for subsidizing imports of green coffee * * *."

"Accordingly, (primary authority) it is hereby ordered:"

"1. The R. F. C. is authorized and directed to establish and carry out the following subsidy program with respect to imports of green coffee:"

"(a) The amount of the subsidy shall be 3¢ per pound * * * of green coffee imported in accordance with the eligibility provisions of this directive."

"1. (c) The Secretary of Agriculture shall establish a quota for each importer * * * proportionate to the importer's allocation as established under WFO 63 * * * "

3

From the foregoing and from the remainder of the directive, it is clear that the dominant purpose described exclusively the status, functions and practices of the Importer as such, and the coffee acquired by the Importers' having engaged in the importation thereof. It was made equally clear that the Directive had no applicability to the established traditional Roaster industry practice of acquiring coffee from Importers thereof.

4

Since traditionally the established practices of the Roaster as such did not include acquisition of coffee from other than domestic sources of supply, it is obvious that the traditional Roaster status, functions and practices as such, were neither within the purview, nor in anywise limited, burdened, changed or otherwise affected by this program. The above intent, purpose and purview of the program is further confirmed by the fact that (1) it was commonly known that the Roaster status, functions and practices constituted the essential economic market for the green coffee after it was imported by the Importer as such, (R. 120)

see admissions, and (2) the established traditional Roaster industry status, functions and practices as such, were indispensable to the normal distribution of coffee in the United States.

5

Therefore, since the coffee import program as spelled out by the Directive did not expressly nor impliedly make any change in, or include the traditional established Roaster industry status, functions and practices as such, the average business man was not unreasonable in concluding that in the continued lawful competitive conduct of his business as a Roaster, (a) it was not necessary to change his traditional status, functions and practices to accommodate this import program, and, (b) that this coffee import subsidy program was concerned strictly and exclusively with the Importer status, functions and practices as such. The program neither gave the Roaster as such any added status, functions and practices, nor did it plainly take away anything from his traditional Roaster status, functions and practices, in all of which he had hitherto labored in complete economic equality with all other Roasters as such regardless of whether he or any other Roaster may have also had and exercised the separate and different economic functions of an Importer.

6

PURPOSES OF THE CONTRACT

In the light of the foregoing intent and purposes of the program, let us determine whether the plain intent and purposes of the contract are different, conflicting with, or more enlarged as to the traditional Roaster status, functions and practices as such, than those as set out in the program.

7

It is admitted that at the time of the original program and contract there existed certain established, known, traditional characteristics, statuses, functions and practices in the coffee indsutry of the United States. (R. 119, 120 & 135).

8

Did the initial coffee import program clearly spell out prospectively or retrospectively, any of complainant's roaster industry traditions, status or practices as such, which the program clearly burdened, prohibited or altered? Did the coffee import contract do so? If so, complainant has been unable to find the language that plainly has such effect. On the contrary, the import program and the contract both left the traditional Roaster industry status, functions and established practices exactly as they were.

9

Therefore, this contract relating to the Importer status, functions and practices of the coffee industry was reasonably expected and interpreted by the complainant, to have no relation to the Roaster status, functions and practices as such, for the simple reason that traditionally in the coffee industry the Roaster status, functions and practices do not include, contemplate or signify importations of green coffee or any of the status, functions or practices of the Importer as such (R. 14).

10

The original and amended contract directly concerned the importation of green coffee into continental United States by the Importer who as such had the qualifications expressly set out in the contract. The contract in part provides:

"* * * R.F.C. has established a subsidy on green coffee imported into the United States, and,

"* * * *the importer is and has been regularly engaged in the importation of coffee* (emphasis ours) and had an import quota established under W.F.O. 63 of the Department of Agriculture." (R. 41).

Thus the subject matter and intent of the contract is initially clearly established as being "the Importer" status and practices and the coffee so to arrive in the continental U. S. resulting from the actual exercise of such importer practices by "the Importer" as such. This is further confirmed by the express definition of "coffee covered" and otherwise by the total tenor of the contract as is reflected throughout its language and particularly at Paragraph 2 thereof (R. 42). Certainly there is nothing in this language clearly showing any intent to include any interest, prejudice or concern whatever with complainant's Roaster status and functions, either prospectively or retrospectively.

11

Complainant invites and urges respondent to point out in the language of the original contract any equally clear expression of prejudice to, or inclusion therein, of any lawful traditional Roaster industry distribution practice by complainant as such.

12

DOES THE FACT THAT THE ROASTER STATUS WAS INTEGRATED WITH THE IMPORTER STATUS, OF ITSELF CLEARLY POINT OUT PREJUDICE TO THE ROASTER STATUS AS SUCH?

At all times pertinent it was commonly known that the industry of the United States was not entirely composed of those who were engaged exclusively in the exercise of singular mechanical and economic functions. On the con-

trary it is traditionally composed of well defined and distinctive segments, each having its own established economic, mechanical and functional inherent requirements, purposes and practices, as was recognized in Booth Fisheries v. Bowles, 153 F. (2d) 449; Electromatic Distributors v. Clark, 162 F. (2d) 212, where it was considered whether a traditional status and functional consequence when engaged in by an integrated management, would necessarily cause or reasonably imply prejudice to, or inclusion of, another and different status and function. The Court upheld the realities of established business practices, in all essential respects identical to the case presented here. In the Booth and the Electromatic cases, supra, the problem was as in the instant case, one of intent and interpretation. Both arose out of regulations under the identical law involved in the case at bar.

13

If there is any difference in the interpretation of the intent and purposes of the identical law between the effect of the Booth case, or Electromatic case, supra, and the case now before the Court, because one arises from contract and the others from regulations under that same law, that difference lends further propriety to petitioner's case, for in neither of the cited cases was there any necessity for mutual consent to such prejudicial departure from established industry practices and consequences, while in the instant case not only is mutual consent essential but it and the intent of the law itself to prejudice in a contract what it does not provide in a regulation, must appear so plainly as to overcome the natural refuge in the traditional coffee industry practices of the Roaster status as such (and the natural understanding within the Roaster industry of the language employed in the contract). (R. 121) (50 U.S.C.A. App. 902 (h).) It is interesting to note

further recognition of the distinction between the Roaster as such, as distinguished from the Importer as such, in Great A & P Tea Co. v. Porter, 156 F. (2d) 813 (813).

14

It cannot be doubted that the contract related to and directly concerned a well defined segment of the coffee industry of the United States. But does it clearly concern all segments or only one or more? It is obvious that the coffee industry had acquired its distinctive segments and their traditions, characteristics and practices. It is common knowledge that the making and performance of contracts covering foreign purchases and importations of that coffee into continental United States is the essential practice of the coffee importer industry, and through the years such practices and the language commonly employed by the industry would take on a fixed and accepted significance within the industry.

15

It is reasonable for petitioner having been engaged in the coffee industry for more than 30 years, to assume to understand and interpret a contract relating to the importation of coffee, in the light of traditional established practices inherently characteristic of that industry. It would be exceptional and unnatural in such circumstances to insist that the petitioner should have anticipated a purpose, intent or consequence from a contract relating to the industry, that is contrary and prejudicial to the long established practices of the industry. Therefore, the only way in which this contract, or the amendments can lawfully prejudice for the first time in history, the established practices of the Roaster industry as such, is for the respondent to show clearly the exceptional and unnatural purpose, and intent of the Act under which the contract arises.

15

16

Since it is clear that the intent of the Act, program and original importer contract do not spell out prejudice to or inclusion of the traditional Roaster industry established status, functions and practices as such, it seems that if such prejudice was anywhere spelled out clearly or enlarged, either prospectively or retrospectively it must plainly appear in Paragraph 14 of the amendments; and must point out distinctly the definite intent to, (a) depart from the long established industry significance of the term "the Importer" and the term "the Roaster" as they relate to the traditional status, functions and practices of each, and (b) must definitely point out the mutual intent to enlarge and extend for the first time (and retrospectively) the industry status, functions and practices so as to include the Roaster status and practices within the status, functions and practices of the Importer.

17

PARAGRAPH 14 OF THE AMENDMENT:

Let us see how clearly Paragraph 14 (R. 51) points out its unnatural intent and mutual agreement to prejudice the Roaster status and functions which had not theretofore been the subject matter of the contract, after complainant had already operated 4 months under the original contract.

18

The pertinent language (R. 51) of the last amendment, under which this complaint arises is:

> "This agreement dated November 19, 1945 made and entered into between R.F.C. and the Importer (petitioner) • • • is hereby modified by mutual agreement in the following terms:

(change in time of coffee arrival in continental United States and custom house clearance * * * change in time for the Importer to file claims * * * change in date * * *)

"In the event of an increase in or removal of OPA maximum prices on coffee, *the Importer* shall pay to R.F.C. an amount equal to the equivalent of the increase in value of *his inventory;* computed as follows:

(a) The rate shall be 3¢ a pound green basis or the increase in OPA maximum prices, whichever is lower.

(b) The inventory shall include all types of coffee * * * which either *the Importer* owns *in the continental United States* or for which a bill of lading covering shipment to the United States *for the Importer's account has been issued in a foreign port;* * * * (Emphasis ours)

19

The amendment then reduces the total of the Importer's described inventory by the quantity of such coffee as the Importer has sold at the old OPA price prior to increase in effect April 1, 1946.

20

There is absolutely no change made in the significance of the term "the Importer." Certainly this language does not plainly say that the status, functions and practices of the Roaster as such, is to become retroactively and prospectively prejudiced *only when exercised* by one who also exercises the separate and different status, functions and practices of the Importer. The plain effect of the continued use of the same language as originally pointed out that "the Importer" is intended to signify the function and consequence of having engaged in the importation of coffee, is to imply that it is not intended to extend any

more prejudice to the continued Roaster industry status and practices than had existed prior to or under the original contract. It cannot be overlooked that this was an importing production program, and R.F.C. had and claims no authority to fix or control prices. Nor can it be forgot that complainant had actually expended the funds for which it now seeks mere reimbursement as agreed. Such payment may be called a "subsidy" but the fact is it was not a "windfall" to complainant, for the price of replacement coffee essential to a normal stabilized economy was forthwith increased more than 3¢ per pound. Petitioner had expended the identical sum in accomplishing imports in its Importer capacity. (R. 132)

21

In the light of the purposes of the contract and the traditional industry practices, the most that can be said for the language: "• • • *the Importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the importer's account* (emphasis ours) has been issued in a foreign port;" is that it is uncertain whether the Roaster status and function as such is intended to become prejudiced by integration with the status and functions of the Importer as such. It is suggested that the draftsman actually did not intend to call the Roaster the Importer. For the Roaster was not concerned with getting coffee into continental United States. Moreover, all the coffee acquired by the Roaster was acquired in such industry practice wholly from domestic stocks. Therefore, the language "owns in continental United States or for which a bill of lading covering shipment to the United States for the importer's account" was pure surplusage and utterly inapplicable to any roaster function or roaster's inventory. This language could reasonably be understood to imply that it meant

either the coffee which the Importer as such had already imported into continental United States or, coffee that he had purchased in a foreign country for shipment to the United States.

22

Such a showing cannot be made by *considering only* Paragraph 14 of the Amendments (R. 51). Nor is such a showing made by the existence of a wilderness of ukases, directives and regulations (such as, "ownership or control" clauses of the meat subsidy), many of which are designed to defeat recovery or accomplish a forfeiture. No such showing has been or can be made, for the terms "the Importer" and "the Roaster" have never been synonymous in the coffee industry, and the Act did not intend that such terms and the practices of the industry to which they relate were to become interpretatively synonymous either in contract or in a regulation, (and retroactively so) for the first time in history with the advent of Paragraph 14 after some four (4) months prior operations under the original contract. (R. 51) Priebe & Sons v. U. S., 68 Sup. Ct. 123 (2-125); Lamont Corp. v. Bowles, 149 F. (2d) 364, cert. denied 66 Sup. Ct. 37, rehearing denied 66 Sup. Ct. 136; U. S. v. Stanolind, and authorities cited, 113 F. (2d) 194; Dixon Iramaous & Cia. Ltd. v. Chase National Bank of New York, 144 F. (2d) 739, cert. denied 65 Sup. Ct. 678; Peebles v. Prudential Insurance Co., 110 F. (2d) 76; Burley v. Elgin I&ER Company, 140 F. (2d) 488, followed in 66 Sup. Ct. 721; Councilor v. U. S., 89 Ct. Cl., p. 473; Tennessee Gas & Transmission v. El Paso Natural Gas Company, 166 F. (2d) p. 9 (1) p. 12 and authorities there cited.

23

Doctrinaire construction ought to admonish against a construction in disregard of industry and economic reality.

(Gaulden v. Southern Pacific Co., 78 Fed. Sup. 651 (656); Foley Bros. v. Filardo, 69 Sup. Ct. (5), p. 578; 12 Am. Jur. 784, Contracts, Sec. 247, and pp. 772, et seq.' Sec. 241, 242; New England Mutual Life Ins. Co. v. Harvey, 82 Fed. Sup. 702; 10 Tex. Jur., p. 356; Jno. L. Denning & Co. v. Fleming, 160 F. (2d) 697; Barksdale v. Fleming, 160 F. (2d) 494).

24

Even if the order as claimed by respondent, has the force of a statute, determination of intent must take into consideration the context of the whole, the circumstances and purposes (People of Puerto Rico v. Shell Co., 302 U.S. 258, 58 Sup. Ct. 169 (3)).

25

Since there are no specific provisions expressly including the traditional Roaster practices within the contract, complainant feels it sound to determine that such status was excluded and not included (*Furi & Co.* v. *Bowles,* 152 F. (2d) 713; *Royal Packing Co.* v. *RFC,* 169 F. (2d) 999). If the traditional background of the industry and the provisions of Sec. 902 (h) of the Act were not to be considered in determining the intent of this contract petitioner was entitled to plain language of such drastic, discriminatory departure from traditional industry understanding and practices.

26

Effect of respondent's interpretation is to limit or partially control the profit, value, income or the competitive position of the petitioner in its continued lawful exercise of its traditional Roaster status industry practices and to forfeit and deprive it of a substantial portion of the lawful value of such Roaster class of inventory, and to impede and place petitioner at a substantial competitive disadvantage as a Roaster in the established industry practices of distribution.

27

Alternatively, the sense of this contract is rendered ambiguous by the amendments thereto, as respects the petitioner's continued lawful exercise of its traditional Roaster industry status and practices (R. 126) equally and alike with all Roasters without regard to integration.

28

THE EFFECT OF SECTION 902 (h) OF THE ACT

Section 902 (h) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 902 (h)), clearly provides that the power to pay subsidies under Section 902 (e) (under which this contract was made (R. 171)), shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except where such action is affirmatively found to be necessary to prevent circumvention or evasion. It does not say these impediments are sanctioned in the case of a contract and forbidden only in the case of a regulation. Nor does it provide for any waiver of such requirements to the validity of either.

29

Would an interpretation of the contract as amended, in a manner consistent with Sec. 902 (h) and the traditional industry practices of the Roaster as such, as distinguished from the Importer as such, tend to circumvent or defeat the purposes of the contract or the law?

30

The status and functions of a Roaster as such obviously did not qualify one as an Importer under the contract. The status and functions of an Importer as such under the con-

tract would not necessarily include the different status and functions of the Roaster as such. This is precisely the distinction as petitioner found in the contract, and is the same as has traditionally obtained in the practices of the industry. Therefore, when the term "the Importer" was employed it was in respect of its importing sense and not intended to either enlarge or diminish the traditional distinctions of recognized status and practices by the industry or the specific qualifications spelled out in the contract whereby one became recognized as "the Importer".

31

In short, the declared prime purposes of the coffee import subsidy Act and the authority for contract were to aid and encourage * * * not to complicate or further disturb the * * * importations and to restore and stabilize normal established distribution. This could not be done except by the Importer engaging in more importations and passing the coffee thus imported by him (on which only he was eligible to receive the subsidy), along to the Roaster.

32

Distribution by the Roasters as such, in the United States was taken care of by the established practices and the economics of the industry itself. Sec. 902 (h) of the Act shows it was not intended to burden or disturb whether by contract or regulation the design of the normal flow of domestic distribution as the same had long been established in the United States. That flow had always been and remained, from the Importer who bought and received the green coffee from the foreign country, into the inventories of more than 1,000 Roasters as such, in the United States equally and alike without regard to R. F. C. import contract eligibility and, from all these many Roasters equally and

competitively into consumer store outlets, wholesalers and institutions.

33

To further aid in stabilizing the economy and quantity available for the desired distribution, W. F. O. 146 (11 F. R. 3785; R. 94), determined the reasonable quantity and equitable distribution of green coffee in everybody's inventory equally and alike. It allowed each of more than 1,000 Roasters to have and keep on hand at all times (which forced equal opportunity for replacement of such inventories), 3½ months' supply in inventory. But it allowed the Importer only 1 month's supply in inventory at any time. There were 312 Importers as the maximum participating in this Import program. When it is remembered that some of these Importers were Roasters also, it becomes fairly obvious that the desired and inevitable effect of the Import program was to encourage the movement and continuing replacement of coffees, not only from foreign countries into the inventories of Importers in the continental United States, but in 3½ times 1,000 larger quantities of constant inventories into the hands of all Roasters equally and alike without regard to whether any Roaster was or was not also an Importer. In short, the purpose was to bring about a stabilized condition—one that contemplated continued flow after the contract ended—rather than mere stop-gap of momentary expedient.

34

Certainly it was not the purpose or intent of the Act to substantially prejudice an established distribution practice by accident. But even if the prejudice had come about through accident, petitioner would still be fairly entitled to the same treatment as all others economically situated identically and directly competitive as a Roaster. It is no

accident that the word "SHALL" appears in the prohibitions as set out in Section 902 (h).

35

Because of the inherent design and economics of the coffee industry in the United States, coffee could not have become normally available for distribution to the consumer except for the continuation of all the practices of the Roaster status. It is hard to see how the court below aids the purpose of the Act by deliberately harming the Roaster established industry practices—while at the same moment encouraging the Importer to do the very things that caused the Roaster prejudice—importing more coffee for the sole economic purpose of passing it along into the hands of the Roaster. (*Genser* v. *R. F. C.*, 169 F. (2d) 136 (3); *Markbreiter* v. *Woods*, 169 F. (2d) 875; *Royal Packing Co.* v. *R. F. C.*, 169 F. (2d) 999; *Swift and Company* v. *R. F. C.*, 79 Fed. Supp. 546.)

36

If Section 902 (h) means anything at all, it means that respondent cannot unnecessarily interpret its contract or issue an "order" as to require that the known, traditional established practices and economics by which distribution normally flows in the coffee industry shall be burdened where none has before existed; that respondent may not so cause the prejudice of added costs to be visited upon or result from an established lawful coffee industry practice; and may not do so indirectly or directly, by contract or by regulation and above all, it shall not do so discriminatorily.

37

In brief, this section forbids any unnecessary burden upon or interference with, the normal distribution effected by sale or purchase, from the foreign countries where the

coffee is grown, to the Importer and from the Importer to the Roaster and from the Roaster to consumer outlet channels such as, wholesalers, retail stores and institutions. This is and has traditionally been the normal method or flow of distribution. Equally traditional has been the Importer's method of distribution to sell his imported coffees to the Roasters—all Roasters equally and alike, regardless of whether any particular Roaster so acquired all or merely a part of his requirements from the Importer.

38

It is common knowledge that all segments of the coffee industry are highly competitive in the United States. The competition was not sought to be eliminated or forbidden by the Act, program or contract. It is our economic situation fostered by the program and undeniably attendant upon restoration and stabilization of normal distribution and economy. It is between products rather than between various means or systems of distribution, selling or merchandizing. (*Bowles* v. *Wilson & Co.*, 63 Fed. Supp. 687.)

39

Complainant urges that Section 902 (h) had a real, rather than a nebulous purpose and intent. It was concerned with the reestablishment and stabilization of normal economy and established distribution practices and in the protection thereof. Its effects ought to be reasonably discernible to an ordinary business man traditionally engaged in the normal established practices of the industry to which the contract is related. He should be able to readily and plainly determine that his normal conduct has suddenly become contrary to law, or prejudicial to his continued normal industry practices. (*U. S.* v. *Figur, et al.*, 80 Fed. Supp. 140 (4 & 5); *U. S. Gypsum Co.* v. *Brown*, 137 F. (2d) 803; *Phila-*

delphia Coke Co. v. *Bowles,* 139 F. (2d) 349 (18 & 19).) Petitioner's conduct was not special or exceptional but was clearly that of the established and traditional Roaster industry distribution practice.

40

In the light of reality the real intent of this entire undertaking was to (lawfully) encourage the Importer's importations; the Roaster's essential place in distribution and in the economy by his consequent acquisitions of the coffee from the Importer and a continuing of normal established processes all along the line—from the Roaster who processed it and in turn put it in usable form for Consumer trade outlets. If that objective could best be encouraged by discouraging the traditional and fullest activity therein by all Roasters alike and all Importers alike, then petitioner has followed an outmoded understanding of our economy and of good reasoning as well. (*U. S. Gypsum Co.* v. *Brown,* 137 F. (2d) 803; *Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (18 & 19).) The best way to get a restored and stabilized economy is for all concerned to continue their normal activities to the fullest possible extent, rather than to encourage one part and handicap another equally essential part of integrated industry.

41

Could these purposes be best accomplished by penalizing a Roaster who obtains a part of his inventory from Importers—when admittedly the identical Roaster status who obtains all his inventory from the Importer thereof is not penalized? If so, is that the best way to encourage one to exercise his Importer status and his Roaster status in aid of normal distribution? It seems academic that NORMAL distribution does not contemplate a diminishing activity

by either status or function. Most assuredly normal economic stability cannot be achieved by disruption or a competitive discrimination.

42

REASONABLE CONSTRUCTION OF THE CONTRACT

Every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different conclusion from what would have been reached, had the usual meaning been ascribed to those words. (*Franklin Sugar Ref. Co.* v. *Wm. D. Mullen Co.*, 12 F. (2d) 885 (887).)

43

In construing bills of lading as in construing other commercial instruments, it is right and duty of the Court to look, not only to the language employed, but to the subject matter, and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties. It has regard therefore, to all the prevailing usages and customs of business. (*W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha*, 12 F. (2d) 519 (521).)

44

It is a fundamental rule that in the construction of contracts the Courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. (*Merriam* v. *United States*, 107 U. S. 437, 441; 2 Sup. Ct. 536, 540; 27 Law. Ed. 531.)

45

Words used in a contract, while not ambiguous in the abstract, may, when considered in relation to the circumstances surrounding the making of the same, create an ambiguity requiring interpretation. *Klueter* v. *Jas. Schlitz Brewing Co.*, 143 Wis. 347, 127 N. W. 43, 32 L. R. A. (N. S.) 383—and cited in *Ark. Amusement Corp.* v. *Kempner*, 57 F. (2d) 473 (7), where the reasonableness or unreasonableness of the result was inquired into.

46

Since the traditional established industry practice has never been to consider the Importer status and functions as synonymous with or prejudicial to the Roaster status and functions, the mere reference to the Importer status and functions as such in respondent's original contract and a repetition of the identical language in the amendments was not fair notice of intent to prejudice the lawful continuation of the Roaster status and functions as such even though both were integrated under one management, if to do so would plainly for the first time discriminate against the petitioner in its lawful exercise of its Roaster status and functions equally and alike with all other Roasters identical as such.

47

In *Commodities Trading Corporation* v. *U. S.*, 83 Fed. Supp. 355 (356) the government requisitioned black pepper owned by the plaintiff and attempted to pay him at the ceiling price of 6½¢ per pound. The Court holds that the government had no authority to deny the owner of non-perishable property of the right to hold his property until controls expired, and therefore, the ceiling price is not the measure of value of the property requisitioned. This case and the cited ones ought to be good authority to show that the re-

spondent's interpretation by which it claims authority to issue its "order" depriving Duncan Coffee Company of a part of the value of its non-imported Roaster status inventory would be invalid. It tends to show the climate within which the effect of the alleged "order" should be properly determined. Green coffees are commonly known to be no more perishable than black pepper when stored in the usual way by one engaged in the coffee business.

48

A contract should be construed so as to give it a reasonable effect. "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results." Williston on Contracts, Section 620, 1936 revised edition.

49

The interpretation of this contract contended for by respondent would not be fair and reasonable since it would jeopardize and penalize the petitioner 3¢ per pound by denying its right to continue to lawfully engage in its Roaster status equally and alike with all other Roasters as such. Moreover, since the contract contains no language directly or impliedly concerning petitioner's Roaster status and practices or the normal results thereof as such, if in fact it were intended that the language actually used should prejudice both the Importer status and the Roaster status then such language obviously is ambiguous and the petitioner is entitled to the benefit of such ambiguity. (*Bruns, Kimbell Co.* v. *National Pressure Cooker Co.*, 83 Fed. Supp. 258.)

50

Respondent cannot lift paragraph number 14 of the modification out from all else and bind petitioner by an inferential interpretation solely upon the single isolated paragraph,

which did not become effective until after the lawful Roaster industry practice had continued without prejudice for 4 months, and thereby fix more than $67,000.00 retroactive prejudice upon the petitioner. In the light of realities the reasonableness and necessity for expecting this Roaster to anticipate that his identical Roaster status and functions were intended to become prejudiced solely because he had and performed the additional and different Importer status, while many other economically identical Roasters economically competitive with him, were not to be or become equally prejudiced, must tax the understanding of the average business man. Certainly such reasoning does violence to the economic reality of this contract in relation to the industry it concerns.

51

WAS THERE MUTUAL CONSENT?

It is clear that recapture was not provided for by the original import contract but came about only by modification after 4 months operation under the original contract. Any modification necessarily relates to the original contract, including the definitions and the implications therein set out. Since the definition of the Importer status of the complainant was not modified in any way, and, only the particular class of inventory that was to become subject to recapture was set out, we are entitled to determine whether this language of the modification clearly pointed out prejudice to the continuation of the lawful known Roaster industry practice and class of coffee which had never before been subject to any prejudice, and if so, whether such prejudice was retroactive, was invalid, or intended or consented to by the petitioner.

52

The modification of course, relates back to the original contract; it could not enlarge the original contract or exclude

any of its provisions except with the same clarity as was employed in the original contract.

53

Considering the inescapable fact that such language does treat the Importer status and imported class of coffee equal and alike with all other Importers regardless of whether any such Importer does or does not have also a Roaster status, and considering the further fact that the established practices of the industry known at all times to the respondent were traditionally such as to lawfully endow the petitioner with a valid lawful Roaster status, and in such Roaster status in every other instance of government controls and industry tradition was treated and dealt with in all things equally and alike with all Roasters regardless of Import status, and considering the fact that both the Director and respondent could have plainly stated their intent to prejudice any Roaster status that was related to or integrated with an Importer status (as they actually did by the "ownership and control" relation in the meat subsidy) it therefore, was not plainly intended to have the term "the Importer" mean or imply a different status when used in the last part of this modification, from the sense, meaning, implications and effects of the same term when used in the beginning and elsewhere in the same contract.

54

Even the grammatical analysis and sense of the particular phrase "which either the Importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the Importer's account has been issued in a foreign port;" (1) plainly implies (if it does not expressly so state) that it is concerned with coffees which either "the Importer" had actually already imported

and received in continental United States or, (2) coffees which "the Importer" had purchased in the foreign country for importation (bill of lading issued for the Importer's account in the foreign port) to the United States. Especially is this true when it is remembered that such is entirely consistent with the traditional industry significance, practices and functions.

55

It cannot properly be said that the language: "The inventory shall include all types of coffee," is sufficient to plainly warn complainant of the pitfalls ahead, for "types" in the coffee industry has never meant or implied anything other than the characteristics of different kinds of coffee, generally with particular reference to the place where it is grown. Respondent does not challenge this fact (R. 123).

Argument under Summary (C)

DISCRIMINATION RESULTING FROM RESPONDENT'S INTERPRETATION

1

The known established practices and Roaster status were traditionally a material element in the distribution and other practices and economics of the coffee industry.

2

It cannot be contended that recapture on the non-imported, non-subsidized Roaster class inventory was necessary or intended to equalize this Roaster with all other Roasters, for it obviously had the exact opposite result. Nor can it be denied that the Director had authority to bring about equal recapture upon the substantial quantities of the identical class of coffee in the hands of all other 688 out of the 1,000 Roasters as such, in the country. A complete answer to the idea that petitioner intended to agree to this singular

prejudice upon its Roaster status and functions lies in the fact that (a) the petitioner was limited in its permitted inventory to the identical supply (3½ months) as were all the other 1,000 Roasters (hence could not benefit by limiting its source exclusively to its own importations, and (b) the petitioner paid the full recapture and does not complain of it, upon every pound of its imported class of inventory, equally with all Importers. Amendment of May 7 by its method of crediting sales by the Importers made at former O. P. A. prices prior to the increase, had the effect only to equalize as to IMPORTED class of inventory only, on which the subsidy had been received by the Importer.

3

Therefore, it is clear that short of a police state, it was not intended, and the stabilized competitive economy and distribution contemplated by this contract, and proper interpretation of the entire contract does not require that the Roaster status and functions, non-subsidized, were to be prejudiced by 3¢ per pound competitive discrimination. It would be unreasonable and contrary to natural justice to impose such prejudice consequent of the status and functions of this Roaster as such, merely because he had and lawfully performed the R.F.C. importing contract for which he has paid recapture on all the coffee imported thereunder, while at the same time allowing many other economically identical Roasters as such, composing a substantial consequence in the industry economy (688 out of 1,000), to remain completely free from burden, although all are highly competitive.

4

"WINDFALL!"

To recover money actually, lawfully and necessarily in good faith first expended in the performance of a contract,

is neither inflationary nor a windfall, particularly when the accomplishment of economic stability and normal distribution flow is known by common sense to require immediate reinvestment and risk of the identical funds.

5

Unfairness, discrimination and unreasonableness unnecessarily result from the "order", or contract, as interpreted by respondent because it draws a distinction between Roaster status and functions and the majority of other identical Roasters as such, economically identical and competitive with complainant, and thereby imposes prejudicial economic and competitive handicap not characteristic of the industry. It is generally regarded as essential to fair treatment that all persons who are similarly situated be dealt with on an equal basis; that no greater burdens should be laid upon one than is laid upon others in the same calling and condition. This principle was applied by the United States Emergency Court of Appeals in the case of regulation which was found invalid because it subjected the complainant to a competitive handicap "not characteristic of the industry prior to price control and which, • • • is wholly unnecessary for the effectuation of the purposes of the Act". (*Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. (2d) 492 (3 & 4), citing *Barbier* v. *Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 359, 28 L. Ed. 923; *Flett* v. *Bowles,* 142 F. (2d) 559 (565); and *Hawaii Brewing Corporation* v. *Bowles,* 148 F. (2d) 846 (2, 3, 4, & 5).)

6

The substance of respondent's contention is simply that, petitioner having lawfully entered into the Importing contract in its Importing status, thereby prejudiced (and retroactively) its equally lawful, necessary and long estab-

lished Roaster status and functions inevitably resulting from a continuation of normal industry distribution practices, (which practices were essential to the economic success of the purposes to which the contract was dedicated) at a material disadvantage with many economically identical and competitive Roasters as such, and that such prejudice was consequent solely because its Roaster status is integrated with its Importer status.

7

It is admitted that petitioner's economic existence depends upon the competitive conduct of its business as a Roaster (R. 129 B. App. 43). The lower court's interpretation necessarily disregards entirely one essential leg of the economic foundation upon which the successful accomplishment of normal stabilized distribution must rest.

8

Where the dominant purpose of the law is to restore and stabilize normal distribution, and the dominant purpose of the contract in the stabilization atmosphere, is to aid and encourage importing of coffee, and the contract is highly vocal as to the Importer practices as such, but is wholly silent as to the coffee Roaster's known, established practices as such, and the practices of each are different, but both are vital to normal traditional established distribution with which the law out of which the contract arises is concerned, the contract ought not to be interpreted so as to burden the Roaster practices unequally and unlike as to all Roasters as such, while it burdens equally and alike all Importers as such, merely because the industry includes some Roasters as such who are integrated under a single management with the Importer practices as such, and because the burden arises from contract under the identical law rather than

under a regulation (both being authorized but not distinguished by this law), when the distribution, economic practices and purposes and dependency of all Roasters as such are identical and such practices do not include importing. Burden and discrimination among those engaged in identical economic established practices and having identical economic dependency as such, should occur, if at all, only when plainly required, and by affirmative finding of necessity, and never by inference or innuendo.

9

It has been suggested that paragraph 14 (c) of the contract would be meaningless if the Roaster's practice as such were not burdened when integrated with the Importer practice. This is not necessarily correct. For the contract provides for certain forfeiture of subsidy by the Importer as such. It could mean that if the Importer's inventory included coffee on which his claim for subsidy had been denied or forfeited, and the Importer had thereby not received as much subsidy as he had coffee in inventory, he the Importer would not be required to pay or repay to R.F.C. a greater sum than he had been paid (reimbursed) by R.F.C. Certainly its meaning is not so clearly set out as an original burden upon the Roaster distribution practice as to be the equivalent of the "ownership and control" clause of other subsidies by regulation, or to include the Roaster practices in the purview of the contract. Should a contract under the same law be less clear than a regulation?

Conclusion

Petitioner urges that a proper interpretation necessitates consideration of the foregoing and of the entire contract and the essential existing premises in the light of which this contract and the modifications were executed and per-

formed; that such consideration will fairly and reasonably entitle petitioner in law, intent and natural justice, prospectively and retrospectively, to the relief from the prejudice of $79,059.36 upon its Roaster status and functions as such, alternatively, to relief from such portion of such prejudice as has been suffered retroactively and here accordingly requests such relief.

Respectfully submitted,

DUNCAN COFFEE COMPANY,
Petitioner,

By SAMUEL H. PEAK,
Petitioner's Attorney of Record.
1200 Carr Street, Post Office
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APPENDIX

FACTS ADMITTED IN RESPONDENT'S ANSWER (R. 134 to 137 Incl.)

1. Complainant duly and timely on the 8th day of December, 1948, filed its protest of such failure and withholding of the complainant's earned funds and each part thereof, as above, with the respondent, a true copy of such protest being attached hereto and made a part hereof for all purposes and marked "Exhibit 4"; that on or about the 16th day of February, 1949, the respondent in writing denied said protest in its entirety in accordance with true copy of such denial attached hereto for all purposes and marked "Exhibit 5."

2. Admits that the objections set forth in the complaint are those asserted in the protest as amended and are those upon which the complainant intends to rely in considering its complaint.

3. The established coffee industry of the United States includes (1) Importers of green coffee whose functions as such are limited to the purchase of green coffee in foreign countries and importation thereof into continental United States, and the sale and distribution of such imported green coffee to Roasters in the United States; (2) Roasters of green coffee whose functions as such are limited to the domestic purchase of green coffee, principally from Importers thereof, the roasting, blending, packaging, sale, and distribution of such roasted coffees into established wholesale and retail consumer trade outlets, and whose functions do not include the importation of green coffee; (3) the Roaster-Importer whose functions are dual and include those of Importer as such, and also those of the Roaster as such.

4. All of the Roaster's functions are performed by the Roaster-Importer in its capacity and status as a Roaster, and are identical in all things, purposes and effects with the functions of the Roaster as such who does not import green coffee.

5. The essential purposes of the business of all Roasters alike without regard to Importer functions, is the acqui-

sition of green coffee primarily from Importers thereof, the processing of such green coffee and the subsequent sale and distribution of such pocessed coffees to wholesale and retail consumer trade outlets.

6. The essential purposes of the business of all Importers is such without regard to Roaster functions, as the acquisition of green coffee in foreign countries, importation thereof into continental United States and the resale and distribution of such imported green coffee to Roasters.

7. The coffee industry of the United States includes many separate and distinct enterprises whose established, traditional and normal functions are as above described in each respective category.

8. The Roaster functions by which complainant acquired its Roaster status inventory were identical in all things economically and mechanically with the functions of each of the Roasters as such equally and alike acquired their Roaster status inventories, regardless of Importer functions or status, and such Roaster functions are the traditional, normal, and established practices of the coffee industry throughout the United States and as such are common knowledge and understanding.

9. Extension of the Emergency Price Control Act as amended did not occur until after this green coffee subsidy program and contract had terminated.

10. Section 902(h) of the Act remained in effect at all times herein.

11. All O. P. A. Price Control Orders, Rules, and Regulations applied in all respects to complainant in its Roaster functions as such, equally and alike with all other Roasters, without regard to whether any Roaster did or did not have or exercise any Importer function or status.

12. All O. P. A. Price Control Orders, Rules, and Regulations applied in all respects to complainant's Importer functions as such, equally and alike with all other Importers, without regard to whether any Importer did or did not have or exercise any Roaster function or status.

13. In acquiring its Roaster status inventory by exercising its Roaster functions as such, complainant did nothing more and nothing less than did every other Roaster as such in the traditional, normal, established practices of the coffee industry. In exercising its Importer status the complainant did nothing more and nothing less than did every other Importer in the normal, established practices of the Importer as such, and complainant has fully repaid $110,135.25 to R. F. C. and does not complain of such recapture on its Importer status inventory equally and alike with all other Importers.

14. At all times pertinent it was common knowledge that complainant was and had been traditionally and lawfully engaged in the exercising of the established industry practices and functions of (a) a coffee Roaster as such, and, (b) a green coffee Importer as such; and it was commonly known that there were separate and distinct enterprises traditionally existing and established in the coffee industry of the United States having and lawfully exercising such dual functions, practices and characteristics in the identical manner as did the complainant.

15. Neither the original contract, nor the amendments required or prohibited the continued exercising of the established lawful industrial functions and practices by complainant as a Roaster as such, or by complainant as an Importer as such.

16. There was no lapse of time between the execution of the contract and the effective date thereof.

17. In the coffee industry the term, "each type of coffee" means and signifies the particular trade characteristics of the particular coffee bean or beans, such as mild, soft, hard, acidity, earthy, etc., and usually indicates such characteristics as are common to the green coffee grown in a particular locality or under certain conditions and methods of cultivation, harvesting, or preparation for shipment.

18. At the terminal date of this contract complainant had on hand the following quantities and classes of green coffee:

(a) 393,712 pounds, which at 3¢ per pound amounts to $11,811.36, lawfully acquired prior to the effective date of the original contract; (b) the additional quantity of 1,482,228 pounds, which at 3¢ per pound amounts to $44,466.84, which complainant had not imported but had acquired instead in the exercise of the normal, established Roaster functions as such, prior to the first amendment; (c) 1,855,940 pounds, which at 3¢ per pound amounts to $55,678.20 likewise acquired in its non-imported, non-subsidy Roaster functions as such prior to the second amendment; (d) 385,660 pounds, which at 3¢ per pound amounts to $11,569.80 likewise acquired in its non-imported, non-subsidy Roaster functions as such, subsequent to the second amendment and prior to June 30, 1946; (e) 3,671,176 pounds, which at 3¢ per pound amounts to $110,135.28 and which complainant had acquired in the exercise of its lawful Importer functions as such under this Import contract. The total amount withheld from complainant by R. F. C. is $189,194.64 at 3¢ per pound on the total quantity of coffee in complainant's hands and which coffee was acquired, (a) prior to the contract; (b) as a Roaster prior to the first amendment; (c) as a Roaster prior to the second amendment; (d) as a Roaster subsequent to the second amendment and prior to June 30, 1946; (e) acquired by complainant in its Importer functions as such during the period of the contract as amended.

19. That complainant mutually agreed, understood, and consented to such withholding of the $110,135.28 at 3¢ per pound on 3,671,176 pounds of green coffee on hand at the terminal date of the contract and which complainant had acquired as the Importer under the contract in the exercise of its Importer functions as such.

20. That R.F.C. continues to withhold $79,059.36 at 3¢ per pound on: (a) 2,241,600 pounds of non-imported, non-subsidy coffee acquired during the contract period by complainant in its Roaster functions as such, and (b) on 393,712 pounds of coffee acquired by complainant prior to the original contract.

21. At all times pertinent, that class of complainant's Roaster inventory as such, on hand at the terminal date of

this program and contract, acquired from domestic sources in the continued lawful exercise of its normal Roaster functions as such (solely out of which this controversy arises) and, substantial quantities of inventory in the hands of all Roasters as such at the same time are economically identical in all things, regardless of whether any Roaster did or did not exercise to any extent also the status and functions of a green coffee Importer as such.

22. Complainant's Roaster status inventory and the Roaster status inventories of all the Roasters alike, without regard to Import contracts, were acquired, not by the exercise of any Importer function, but were acquired instead from the same identical domestic source of green coffee supply and traditional normal distribution within the United States from the various green coffee Importers as such who had themselves imported such coffees for the purpose of distributing such coffees to complainant and all other economically identical Roasters as such, and to a lesser extent from other Roasters, in the United States.

23. There were at least 1,000 established Roaster status enterprises as such in the United States, without regard to Importer functions.

24. There were a maximum of 312 Importer status enterprises as such, who participated in this green coffee Import subsidy program, without regard to Roaster status or functions.

25. Complainant is and has been traditionally a Roaster-Importer economically and mechanically identical, equally and alike in all Roaster functions with all Roasters as such, without regard to Import contracts, and identical equally and alike in all Importer functions with all Importers as such, with the exception of the fact that it resold to other Roasters a lesser proportion of the green coffee imported by it than that sold to Roasters by Importers who exercise no Roaster functions.

26. Complainant is a single independent private enterprise with its business office situated in Houston, Texas, operating three coffee roasting plants in Houston and Cor-

pus Christi, Texas, having approximately 30 of its own roasted coffee trade wholesale sales outlets from its own warehouse stocks of roasted coffee, and approximately 75 independent jobber wholesale trade outlets, situated at various locations principally in Texas, Louisiana, Arkansas and Oklahoma. All of complainant's business functions are integrated within a single corporation administered by a single management organization. All complainant's roasted coffees are sold by it under its own brand names.

27. Within the State of Texas alone complainant has approximately 40 Roaster competitors identical in all things as Roasters and only 6 of such Roasters exercise any Importer functions.

28. Within complainant's own sales area there are approximately 15 brands of coffee which are nationally or substantially nationally advertised, sold and distributed, and approximately 50 sectional or regional brands, all of which are directly competitive with complainant as a Roaster.

29. All the Roasters as such in the United States without regard to Importer function or status, were subject to the same identical Roaster controls, and, all the Importers as such, in the United States without regard to Roaster function or status, were subject to the same identical Importer controls.

30. The Roaster functions by which complainant acquired its Roaster status inventory were identical in all things economically and mechanically with the functions by which all Roasters as such equally and alike acquired their Roaster status inventories regardless of Importer functions or status, and such Roaster functions are the usual, normal and traditionally established practices of the coffee industry throughout the United States, and as such are common knowledge and understanding.

31. In acquiring their Roaster status green coffee from Importers as such, and from other Roasters, in the United States, (regardless of whether any Roasters did or did not also exercise any Importer function), complainant and all

other Roasters alike were thereby exercising a Roaster function as distinguished from an Importer function, and such function had long been commonly known and established as the normal distribution practice of the coffee industry, and, without the exercise of such Roaster function, there could be no normal market for, and normal distribution of, green coffee purchased in the foreign countries and imported by the Importers as such.

32. In the exercise of its Roaster status and functions complainant and all Roasters alike were subject to and privileged by the same identical green coffee allowances and controls of W.F.O. 146 which applied to all Roasters equally and alike without regard to Import contracts, and which continued in force without lapse until after this green coffee import program had ended and until coffee was decontrolled October 17, 1946.

33. Complainant and all other Roasters alike without regard to Import contracts, were subject to the same identical green coffee purchase price controls. Complainant and all other Roasters alike were economically dependent upon sales of their Roasted coffee to wholesale and retail consumer outlets in the United States. Complainant and all other Roasters alike without regard to Import contracts, were subject to the same identical selling price controls upon all their roasted coffee equally and alike. Complainant and all other Roasters alike made the same identical economical use, employment and distribution of their coffee, and such was the normal, established and commonly known industry practice.

34. It was also commonly known that complainant prior to the terminal date of this Importer status contract had lawfully expended a total sum equal to the amount now withheld from complainant by R.F.C., in the complainant's reasonable and proper accomplishment of actual importations in its Importer status, of an equivalent quantity of imported green coffee within the provisions and intent of complainant's Importer status contract number 268.

35. It is common knowledge that the business of all Roasters alike is highly competitive.

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared Paul E. Taft, Assistant to the President of Duncan Coffee Company, complainant herein, known to me to be the person whose name is subscribed hereto, and who, after being by me first duly sworn, upon oath states, that each and all of the matters and facts as set out in the foregoing complaint are true and correct.

(Signed) PAUL E. TAFT.

Sworn to and subscribed before me this the 12th day of March, 1949.

(Signed) FLORENCE CANNAN,
Notary Public in and for Harris County, Texas. (Florence Cannan)

SWORN FACTS INTRODUCED WITH COMPLAINANT'S PROTEST PROCEEDINGS. (R. 4 to 17 incl.)

1

November 23, 1945, upon consideration of information as to the critical *need for encouraging imports of green coffee,* furnished by the O.P.A., the State Department and the Department of Agriculture, and upon finding that it is *necessary* to provide *for subsidizing imports* of green coffee to avoid a shortage of ~~coffee, the Stabilization~~ Administrator issued Directive 87 (10 F.R. 14450), authorizing and directing R.F.C. to establish and carry out a subsidy *program with respect to imports of green coffee.*

2

The Administrator so acted pursuant to the declared authority of the Stabilization Act of 1942, as amended (50 USCA App. 961 et seq.), *Executive Order 9250,* (note at end of 50 USCA App. 901) and other Executive Orders and Directives. Directive 87 and all amendments were issued under the subject: *"Imports of Green Coffee."*

3

Pursuant to Directive 87, and the Emergency Price Control Act (50 USCA App. 901 et seq.), as of November 19, 1945, R.F.C. in its corporate capacity and complainant *in its importer capacity,* (as the Importer engaged in the importation of green coffee), by mutual agreement and in consideration of their mutual promises, entered into their valid *coffee importing subsidy contract* whose provisions described the contemplated activities of the complainant and the class of coffees covered and concerned, thereunder.

4

For some 30 years prior to this time Duncan Coffee Company of Houston, Texas, was and remains, continuously engaged in the business of a coffee Roaster. In the long established Roaster industry practice, it has from time to time regularly acquired green coffee *from* (1) *Importers thereof,* (2) from other *Roasters,* and also from (3) its own importation directly from foreign countries. Such was the established Roaster industry practice at all times herein. A coffee Roaster is a manufacturer or processor of green coffee. Importation is merely one of the sources used by Roasters to obtain a part of their green coffees, to be processed by the Roaster capacity and then distributed into consumer trade channels.

5

The Importer does not acquire his green coffee from domestic sources but only from importations, and "the Importer" established industry practice is to sell such coffee to Roasters, including Roasters who may also import a part of their own requirements. All these facts were common knowledge and practice of the coffee industry at all times herein and were or reasonably could have been known to R.F.C.

6

At all pertinent times, there were more than 1,000 regularly established Roasters in the United States. Within the complainant's immediate trade there are more than 40

other identical and economically competitive Roasters, not more than 6 of whom are also Importers of green coffee. A maximum of 312 *Importers, and Roasters who also imported,* participated in this green coffee import subsidy program; 281 remaining after March 19, 1946, and 273 remaining after May 7, 1946, to the end of the program; (Letter September 8, 1948, Honorable Harley Hise, Chairman of the Board, R.F.C. to Senator Tom Connally). Out of all the 312 participants in the program it is a reasonable estimate that at least 250 were Importers who did not also engage in any Roaster capacity. The exact information is in the possession of R.F.C., or can be reasonably obtained by R.F.C. There are many Importers who are not also Roasters but whose business is confined wholly to the Importation of green coffee. All of the more than 1,000 Roasters, regularly procure either all or a part (many Roasters procure their total requirements) of their green coffee from these importers who are not Roasters. (R.F.C. Admissions, George B. Stover.)

7

Long prior to Directive 87, under W.F.O. 63 the Department of Agriculture had established maximum green coffee import quotas for each Importer capacity, without regard or prejudice, whether such Importer was or was not also engaged as a Roaster who as such acquired green coffee also from domestic sources, and O.P.A. had established the maximum purchase price which any Importer capacity could pay for green coffee in any foreign country. Selling prices for all green and roasted coffee in the United States were likewise established. These prices were identical and equal for all Roasters and all Importers.

8

In the lawful exercise of its Importer capacity, at the time of Directive 87 complainant had been assigned a quota of green coffee which it could import into the continental United States.

9

At no time from the beginning of government controls of coffee by O. P. A. order December 27, 1941, until decontrol

on October 17, 1946, was any restriction, limitation, prejudice or penalty ever placed by any authority upon the lawful continuation of complainant's exercise of all the practices of its Roaster industry, which was *not likewise placed equally, equitably and in identical manner, extent, purpose and effect upon ALL ROASTERS* economically alike, without regard to whether ANY ROASTER did or did not have also an Importer capacity (and vice versa)—UNTIL after May 7, 1946, when R. F. C. came to interpret the purpose, intent and effect of its modification of its green coffee import contract with complainant.

10

R. F. C.'s interpretation herein complained of *places a burden of 3¢ per pound ($79,059.36) upon complainant's* non-imported, non-subsidized *Roaster class of inventory* acquired in the lawful exercise of complainant's identical Roaster industry practice, *which is not placed upon substantial identical inventories of many other Roasters* acquired, used and sold in all things at and under identical times, circumstances, controls and economically competitive with that class of complainant's inventory.

11

There was no limitation, prejudice, jeopardy or restriction placed upon complainant's continued lawful Roaster industry practices equally with all other Roasters, by the express provisions of this original contract. Only its capacity as the Importer engaging in the importation of coffees was set out or referred to within the provisions and purposes of this original contract or of Directive 87. Neither the law, Directive, nor the original contract plainly fixed any prejudice upon complainant's continuing to engage in the established practices as a Roaster equally with ALL Roasters. The Relationship between the parties was treated with, considered and referred to at all times by the parties as a valid, binding and lawful contract within the contemplation of all pertinent laws and of Directive 87. A true copy of said contract and amendments is attached as Exhibit "A," the originals being in R. F. C.'s possession.

12

Prior to such importation by the complainant under said contract, R. F. C. knew that world market conditions were such that the complainant would reasonably be required to first expend a sum equal to the 3¢ import subsidy in order to accomplish the importation of coffee as contemplated by the contract, and that it was lawful for complainant to do so.

13

Prior to and at all times during the period of this contract R. F. C. knew that the complainant was and had long been regularly engaged in the established practices and capacity as a coffee Roaster, and that it was the established practice of all the Roaster industry to acquire green coffee from established domestic sources of supply in order to wholly or partially meet the needs of individual coffee Roasters for green coffees; that some Roasters regularly imported for their own use as Roasters a part of their green coffee requirements and consequently were lawfully possessed of dual capacities both as Roasters and as Importers; that the Roaster's selling price of processed coffees was not in any respect affected by the manner, source, or mode of distribution by which the Roaster obtained green coffee for his use as a Roaster; that some Roasters imported none of their green coffee supplies. At all times the normal and established flow of green coffee is, from the foreign country to the Importer, to the Roaster, to (after processing) the consumer outlets.

14

This contract was first modified after 4 months operation thereunder, on March 19, 1946, and finally on May 7, 1946. No consideration was expressly provided by either of the modifications, beyond that set out in the original contract, for complainant's refraining from or electing whether, or to what extent, its long established Roaster practice would become prejudiced by, or for any change or diminution in its continuation of such established Roaster industry practice of regularly acquiring part of its green coffee as a Roaster, from domestic sources of supply and without preju-

dice thereby, as distinguished from its direct importations of a part of its green coffee requirements in its separate capacity as "the Importer" "engaged in the importation of green coffees."

15

The lawful continuation by ALL Roasters equally and alike of the established Roaster industry practice of acquiring all or part of their green coffees from Importers would not tend to defeat or circumvent the Act or the green coffee import program; but would aid in restoration and stabilizing the total green coffee inventories and the normal flow and volume of distribution and production into continental United States, for the Roasters compose the only normal market and outlet for green coffee imported by the Importers. Green coffee in the continental United States serves no economic purpose or benefit until it has been acquired by or made available to a Roaster for processing and distributing into consumer channels. Originally and as modified the contract provided for the subsidy upon importations by "the Importer" (which subsidy all parties knew to be in reimbursement of costs previously incurred by the Importer), upon the accomplishment of his specific importations of green coffee within the provisions of the contract.

16

No import subsidy could become payable to the complainant unless, (1) such green coffee had been *both purchased by the Importer and loaded* on board a *carrier for continental United States* for the importer's account, not later than June 30, 1946, (modification of March 19, 1946), and (2) such importations were actually so accomplished *by the Importer* not later than August 15, 1946 (modification of May 7, 1946).

17

The original contract defined "carrier" as an ocean going vessel *in a foreign port on which coffee is loaded, with an on-board bill of lading for shipment to the continental United States,* and a freight car in a foreign country on which coffee is loaded *destined for a point in the continental United States.* This definition was never changed.

18

The complainant agreed to suffer forfeiture of subsidy in the event of violation of any law or lawful regulation or order applicable to the sale or distribution of coffee, including reasonable inventory and equitable distribution thereof. W. F. O. 146 (11 F. R. 3785) was promulgated and *remained in effect without lapse* until long after June 30, 1946, which was the *last date under this contract* for the purchase by the Importer of subsidized green coffees in a foreign country. This order expressly defined a Roaster, and it applied separately to, and provided for 3½ months supply as the reasonable quantity of inventory which *any Roaster capacity could lawfully have on hand regardless of whether such inventory was imported or acquired from domestic sources,* and for 1 month's supply which any Importer capacity could lawfully have on hand. It did not prejudice the lawful continuation of, and it recognized the distinction between, the lawful Roaster industry practice and the equally lawful but separate Importer capacity.

19

No accusation of violation has at any time been asserted against the complainant.

20

From the inception of the original contract, the complainant continued to engage in the lawful Roaster industry practices. It also engaged in the lawful importation of green coffee as described and provided for within the original and modified contract. At the terminal point of this contract, *at least 688 other Roasters in the continental United States* had on hand a substantial quantity of coffee economically in all things identical with complainant's non-imported, non-subsidized, Roaster class of inventory (total of more than 1,000 Roasters, maximum of 312 Import contracts including some Roasters who also import). None of the Roaster class of coffee in the hands of any of these 688 other Roasters was ever subjected to any prejudice by recapture or otherwise similar to the recapture sought by R. F. C. herein against the identical Roaster class of coffee

of the complainant. Approximately 40 of these 688 Roasters are in complainant's immediate home area and are directly economically competitive with complainant. As the result of R. F. C.'s interpretation of the purpose, intent and provisions of the Act, the Directive, the original and modified import contract with complainant, the Roaster class of non-imported, non-subsidy coffee in complainant's hands suffered a disadvantage of 3¢ per pound prejudice in comparison with identical competitive class of coffee in the hands of many other Roasters for identical economic use and purposes.

21

Complainant could relieve himself of the recapture prejudice as to such identical non-imported, non-subsidy Roaster class of coffee only by selling at the old (April 1, 1946) O. P. A. ceiling price between June 30 and August 14, 1946, although, as "the Importer" he had to expend this entire 3¢ per pound ($79,059.36) in order to accomplish the importation *of equivalent imported coffees,* while the many competitive Roasters were free to sell the identical class of Roaster inventory without penalty, *at uncontrolled prices between June 30, 1946, and July 25, 1946, and at the same O. P. A. price as the complainant at all times theretofore and thereafter.*

22

At the termination of the contract R. F. C. withheld from the complainant's earnings from its proper accomplishment of actual importations, the sum of $11,811.36 (293,212 pounds) at 3¢ per pound by reason of Roaster class, non-imported, non-subsidy coffees which complainant had in its Roaster inventory at the end of the contract, but as to which coffees (2,241,600 pounds) complainant had not imported nor performed any of the activities, conditions or requirements as set out or described in the import contract, at any time and upon which complainant was not entitled and did not receive any import subsidy; such class of coffees having been acquired by complainant as a Roaster, from usual domestic sources of supply in the same Roaster industry practice and manner for the same economic pur-

poses and at the same lawful costs therefor *as did all coffee Roasters,* without regard to whether any other Roasters were or were not also lawfully possessed of dual capacities as Importers or had R. F. C. import subsidy contracts.

23

$44,466.84 of the above sum of $67,248.00 withheld by R. F. C. as above, at 3¢ per pound *is represented by such non-imported Roaster class of coffees so lawfully acquired by the complainant from domestic sources in the established Roaster industry practice as a Roaster prior to the first contract modification of March 19, 1946,* and, *$55,678.20* of such sum at 3¢ per pound, was so acquired by the complainant *prior to the second and final* contract *modification of* May 7, 1946. Complainant lawfully accomplished the *importation into continental United States* of sufficient green coffees within the provisions of its contract with R. F. C. to become properly entitled to $79,059.36 additional green coffee import subsidy in reimbursement of an equal expense incurred by complainant in the lawful course of such importations, except for R. F. C.'s interpretation herein complained of.

24

The complainant intended and agrees that the modifications obligated it to *repay* to R. F. C. 3¢ per pound, and has so repaid the sum of $110,135.27 represented by either, (1) coffees owned by and upon which the complainant had *accomplished the importation into continental United States* or, (2) coffees owned by and for which a *bill of lading covering shipment to the United States for the importer's account, had been issued in a foreign port,* which remained in the complainant's unsold inventory at the terminal date of said contract.

25

The lawful continuation without recapture prejudice of the established industry practice of all Roasters in acquiring all or a part of their green coffee from Importers in the same manner as they had done prior to this coffee import

program would not tend to defeat the purpose of such import program, but would tend to restore the normal flow of distribution and the normal building up of total green coffee inventories, in the United States, and such practice was not forbidden but was lawfully permitted to all Roasters alike under the terms of W. F. O. 146 regardless of whether any Roaster did or did not also import or did or did not have an R. F. C. import subsidy contract.

26

All the Roaster industry practices, (economic and mechanical functions) of the complainant at all times herein and for some 30 years prior hereto were in all things identical to the traditional practices of all other Roasters. *The only difference between the practices of all other Roasters and the practices of the complainant in this case is the mere matter of degree or extent.* Complainant indulges in such practices by which its Roaster class of inventory is obtained only to a lesser extent than do those Roasters who procure all of their coffee as a result of such practices. The *recapture prejudice complained of* in this case *is confined to all Roasters including the complainant.* It is not disputed that as to the Roaster class of coffee concerned in this case complainant is and has always been a Roaster exactly as and identical with all Roasters.

27

The size, volume of business, area covered or degree or extent of established industry practice of any Roaster or any Importer were not directly or indirectly made the basis for the program, Directive or the import contract. These factors did not affect the intent of the contract or the consent of the complainant.

28

The only classification or qualifications concerned were solely such as constituted of the complainant "the Importer" "engaged in the importation of green coffee," and, as to such Importer status and the Importer class of inventory and the recapture thereupon complainant

makes no complaint, because it is and has been treated equally and alike with *all Importers!* But as to complainant's equally lawful Roaster status, practices and class of inventory the complainant is not and has not been treated equally and alike with *at least 688* out of the total of 1,000 other Roasters who are situated identically with complainant as Roasters and as to such class of coffee and industry practices.

29

The import subsidy contract and modifications were prepared by R. F. C. At no time prior to termination of the import subsidy contract did complainant ever understand, nor did R. F. C. ever advise complainant that R. F. C. intended by such import contract to prejudice any of the complainant's continued lawful Roaster industry practices or any Roaster class of coffee derived from such established Roaster industry practice. At no time prior to termination of this import contract was complainant ever advised or informed nor did complainant ever so understand, agree or consent, that the purpose, intent or effect of its R. F. C. import contract was intended to restrict, limit, prejudice or diminish complainant's continuation of the lawful traditional Roaster practices upon the same basis and to the same effect as and equally with all other Roasters without prejudice thereby.

30

Complainant did not knowingly understand, consent or agree that the intent, purpose or effect of its performance of its R. F. C. import contract equally and upon the same basis as all other Importers was intended to prejudice complainant's equally lawful Roaster practice unequally with, and to complainant's disadvantage in comparison with all other Roasters engaging in such identical industry practices and economically competitive with complainant's identical class of coffee.

31

The effect of R. F. C.'s interpretation of complainant's import contract is equal and alike as between complainant and all other Importers, but is unequal and to plaintiff's

substantial disadvantage as between (a) complainant and all other Importers who are not also Roasters, and (b) as between complainant and many other Roasters economically identical with complainant and who had a substantial quantity of the same class of coffee as the complainant but who were not also Importers.

32

No consideration was ever passed between the parties beyond that set out in the original contract.

33

Under R. F. C.'s interpretation, the only possible way the complainant could relieve its Roaster class of non-imported, non-subsidy coffee from the prejudice of 3¢ per pound ($79,059.36) was to sell such class of coffee between June 30 and August 14, 1946, at O. P. A. fixed prices prior to increase therein. None of the substantial quantity of identical class of non-imported, non-subsidy Roaster class of coffee in the hands of more than 688 other Roasters economically identical and competitive with complainant but who did not also import, was ever subject to such or any similar prejudice or requirement whatsoever.

34

The term "the Importer" and the term "the Roaster" are not and have never been synonymous in the coffee industry. In the coffee industry *the practice of the Roaster in acquiring green coffee from domestic sources of supply including other Roasters and Importers is not and has never been known, understood or referred to as being the same as "importation of green coffee" or importing.* In the coffee industry the term "the Importer" does not and has never meant, identified, signified nor implied the acquisition of green coffee from any domestic source of supply but has always meant, identified and signified the singular activity of actual importation and the specific coffee actually imported consequent of such activity. In the coffee industry all contracts and transactions relating to green coffee are

and have always been commonly known, used and interpreted in all things in full accord with the above and foregoing distinctions.

35

In the coffee industry the term, "types of coffee" has traditionally meant and still indicates and refers generally to the characteristics of the particular coffee beans, such as, hard, soft, mild, earthy, acidity, etc. It customarily relates to the place of origin or growth, for such coffees naturally have certain inherent known characteristics as distinguished from coffees grown in other localities.

36

Complainant timely made proper claim for the total of all sums earned by it as the importer of all coffee received by it in the continental United States within the requirements of its import subsidy contract herein. R. F. C. has paid all subsidy due and claimed by complainant except that involved in this controversy.

37

Except for R. F. C.'s interpretation of its contract as amended so as to assess recapture prejudice upon complainant's non-imported, non-subsidy Roaster class of coffee which *was not* imported by complainant during or within the Contract, complainant would be properly due and lawfully entitled to receive the sums herein sought by complainant.

38

Since the controversy involves primarily interpretation of the contract and intent of the parties, upon timely presentation of complainant's contentions, protests and express claims herein to R. F. C. it was agreed between R. F. C. by the Honorable John D. Goodloe, its Chairman of the Board, and Samuel H. Peak, as counsel for complainant, that R. F. C. would defer its final consideration of and action thereupon pending the action of the United States District Court at Houston, Texas, in a Civil Action filed therein by complainant, and that no prejudice should result to complainant by reason thereof, but that R. F. C.'s final

consideration, determination and action upon complainant's protest herein would be made and had as necessary subsequent to the determination by said United States District Court.

39

The United States District Court at Houston, Texas, having now lawfully determined that it is without jurisdiction to hear and determine the claim of this claimant or the merits of the controversy in these premises, and having so entered its judgment accordingly on the 15th day of November, 1948, complainant here in accordance with its agreement with R. F. C. as aforesaid, completes its protest procedure and amendment thereof and files the same with R. F. C. and now accordingly requests R. F. C.'s consideration hereof and final action hereupon, and the payment to complainant of the same withheld by R. F. C. from complainant by reason of complainant's lawful Roaster class of its non-imported, non-subsidy coffee in complainant's inventory at the termination of said green coffee import subsidy contract and which coffee complainant had so acquired, (a) prior to the original contract, (b) prior to the first modification, (c) prior to the final modification, and, (d) prior to expiration of the contract as amended.

DUNCAN COFFEE COMPANY,
Complainant,

By PAUL E. TAFT,
Assistant to the President.

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared Paul E. Taft, known to me to be the person whose name is subscribed hereto, and who after being by me first duly sworn, upon his oath states:

My name is Paul E. Taft. I am a resident of Houston, Harris County, Texas. At all times pertinent to these premises I was and am employed by the Duncan Coffee Company in the capacity of Assistant to the President and a part of my responsibility and duties includes all matters having to do with the acquisition of, and transaction of the

Duncan Coffee Company's business relating to green coffees whether imported or whether acquired by it as a Roaster in the course of traditional industry practices, from domestic sources of supply. I am personally familiar with the established coffee industry practices including those of the Roaster and those of the Importer. I have been engaged in the coffee business for many years and I am presently a member of the Board of Directors of the National Coffee Association of the United States which is composed of those individuals and firms engaged in the coffee business and representing approximately 90% of all of the Coffee business in the United States.

I have read and understand each and all of the foregoing facts from number one to number thirty-nine inclusive. To my personal knowledge each and all of the same are true and correct in all respects and particulars. Wherever specific quantities relating to any class of inventory or specific amounts or sums are set out, mentioned or referred to in the above recitation of the aforesaid facts, such quantities and such sums are true and correct to my personal knowledge and are in full agreement and accord with the books and records of the Duncan Coffee Company. Such books and records at all times herein as the same pertain to each and all of the foregoing facts were at all times herein and are now, originated, kept and the entries thereupon are made and established either by me personally or directly under my direction, supervision and control. This affidavit is made, executed and delivered by me for the express purpose of verifying under oath and furnishing proof to the Reconstruction Finance Corporation, of the accuracy and correctness of each and every fact as the same is hereinabove set out and related herein.

PAUL E. TAFT.

Sworn to and subscribed before me this the 7th day of December, 1948.

FLORENCE CANNAN,
[SEAL.] *Notary Public in and for Harris County, Texas.* (Florence Cannan)